Consolidated Cases Nos. 04-1034 and 04-1384

FILED
DEC 2 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JOHN A. RAPANOS; JUDITH A. NELKIE RAPANOS;
PRODO, INC.; ROLLING MEADOWS HUNT CLUB; and
PINE RIVER BLUFF ESTATES, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

JUNE CARABELL; KEITH CARABELL;
HARVEY GORDENKER; FRANCES GORDENKER,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

**On Writs of Certiorari to
The United States Court of Appeals
for the Sixth Circuit**

BRIEF OF *AMICI CURIAE* FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS, NATIONAL ASSOCIATION OF REALTORS®, UTILITY WATER ACT GROUP, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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December 2, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTIONS PRESENTED

Rapanos v. United States

1. Does the Clean Water Act prohibition on unpermitted discharges to "navigable waters" extend to nonnavigable wetlands that do not even abut a navigable water?

2. Does the extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress's constitutional power to regulate commerce among the states?

Carabell v. U.S. Army Corps of Engineers

1. Does the Clean Water Act extend to wetlands that are hydrologically isolated from any of the "waters of the United States"?

2. Do the limits on Congress's authority to regulate interstate commerce preclude an interpretation of the Clean Water Act that would extend federal authority to wetlands that are hydrologically isolated from any of the "waters of the United States"?

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INTERESTS OF *AMICI CURIAE*

The Government's assertion that the term "waters of the United States," under the Clean Water Act (CWA or Act), extends to all geographic features that have a hydrological connection to navigable waters affects numerous activities undertaken by *Amici Curiae*. All parties have consented to the filing of this Brief.[1]

The Foundation for Environmental and Economic Progress (FEEP) is a national coalition of land-holding companies that advances balanced federal environmental law and policy affecting private land use. FEEP members own property throughout the Nation and must obtain CWA permits to manage and develop land.

The National Association of Realtors® (NAR) is a non-profit professional association of over 1.1 million members in the real estate industry. NAR's members' business activities are adversely affected by unwarranted limitations on the use of property, as are those of its members' clients and customers.

The Utility Water Act Group (UWAG) is an association of 205 electric utilities and four national trade associations of electric utilities: The Edison Electric Institute, the National Rural Electric Cooperative Association, the American Public Power Association, and the Nuclear Energy Institute. UWAG's members operate facilities that generate, transmit, and distribute over fifty percent of the Nation's electricity. UWAG members frequently obtain CWA permits to construct and maintain their generation facilities, transmission and distribution lines, and their associated families.

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[1] The letters of consent have been filed with the Clerk of Court. Pursuant to Rule 37.6 of this Court, *amici* state that their counsel authored this brief and *amici* paid for it. This brief was not written in whole or in part by counsel for a party to these cases, and no one other than *amici* made a monetary contribution to its preparation.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. With a substantial presence in all fifty States and the District of Columbia, the Chamber represents an underlying membership of more than three million businesses and organizations of every size and kind. As the principal voice of American businesses, the Chamber regularly advocates the interests of its members in federal and state courts throughout the country on issues of national concern.

SUMMARY OF ARGUMENT

The plain language of the CWA expresses Congress's intent to regulate "navigable waters." The term "navigable waters" means "the waters of the United States, including the territorial seas." This Court has found the reach of the Act to be clear, and has approved an extension of jurisdiction beyond navigable waters only for wetlands that are inseparably bound up with and have a significant nexus to navigable waters. The Court based this limited extension on clear congressional intent to regulate such wetlands. Thus, the Act only reaches nonnavigable waters if they have a significant and inseparable bond with navigable waters. This bond must be important, consequential, and weighty; the connection with navigable waters must occur on a regular and ordinary basis.

The Government claims this Court's "significant nexus" test can be met by any hydrological connection through any type of conveyance, no matter how infrequent or attenuated. The Government's application of the any connection theory extends jurisdiction to distant, intrastate ditches, ephemeral desert drainages, underground pipes, and other areas even more remote than it reached under the debunked Migratory Bird Rule. Like the bird rule, the any connection theory carries the Government well into the traditional province of the States. Yet, the Act contains no clear statement, and there is no legislative history to suggest, that Congress authorized or intended this result. To the contrary, Congress chose to

"recognize, preserve and protect the primary responsibilities and rights of States" over land and water resources. Indeed, the agency regulations that were in effect the last time Congress considered the scope of the Act excluded such features from jurisdiction. Likewise, the current regulations that define "waters of the United States" exclude ditches and purport to regulate intermittent streams only under an "affecting commerce" rationale that is no longer viable. They do not mention ephemeral drainages at all. Nor do they suggest that "any connection" can be a basis of jurisdiction. Finally, it is not necessary to call every ditch or ephemeral drainage a water of the United States. The Act provides ample authority for the Government to regulate upgradient polluting *activities* that will impact navigable waters without federalizing the *locations* where the activities occur.

ARGUMENT

Although nominally about "adjacent wetlands," these cases are really about ditches. This is so because the Rapanos and Carabell wetlands may be deemed "waters of the United States" if and only if the ditches to which the Government claims the wetlands are adjacent are themselves waters of the Untied States. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-25 (1985) (holding that wetlands adjacent to a navigable waterway are waters of the United States). In both *Rapanos* and *Carabell*, the lower court erred when, contrary to this Court's decisions in *SWANCC*[2] and *Riverside*, it determined that because the ditches at issue here had a hydrological connection, through miles of other ditches, intermittent creeks, and culverts, to navigable waters, the

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[2] *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (*SWANCC*).

ditches had a "significant nexus" with navigable waters, and therefore, CWA jurisdiction was proper.[3]

I. THE CWA REGULATES "NAVIGABLE WATERS" AND MAY REACH NONNAVIGABLE WATERS ONLY IF THE NONNAVIGABLE WATERS HAVE A "SIGNIFICANT" AND "INSEPARABLE" BOND WITH "NAVIGABLE WATERS."

Section 404(a) of the CWA regulates the "discharge of dredged or fill material into the navigable waters." 33 U.S.C. § 1344(a). Section 502 defines "navigable waters" to mean "waters of the United States, including the territorial seas." *Id.* § 1362(7). The Government has interpreted the term "waters of the United States" to include ditches and drains that have "a" hydrological connection to navigable waters. Yet, by its terms, the CWA does not grant jurisdiction over ditches and drains, nor does it grant jurisdiction over any water based solely on a hydrological connection to navigable waters.[4]

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[3] *Carabell v. U.S. Army Corps of Eng'rs*, 391 F.3d 704, 710 (6th Cir. 2004), *cert. granted* 126 S.Ct. 415 (2005) (CWA jurisdiction over nonnavigable waters requires a significant nexus to navigable waters, "which can be satisfied by the presence of a hydrological connection"); *United States v. Rapanos*, 376 F.3d 629, 642 (6th Cir. 2004), *cert. granted* 126 S.Ct. 414 (2005) (sites at issue "contained a hydrological connection to navigable waters and thus fell within the jurisdiction of the CWA").

[4] The Government attempts to gloss over this semantic inconvenience by referring to the ditches and drains as "tributaries." But tributaries are not in the statute either. In fact, the 1972 Conference Committee struck a reference to "tributaries" that had been included in the Senate's definition of "navigable waters." *See* S. 2770, 92d Cong. § 502(h) (1971), *reprinted in* 2 Cong. Research Serv., Legislative History of the Clean Water Act, at 1698 (1973). Moreover, the last time Congress considered the CWA, the Corps's regulations excluded ditches from jurisdiction and asserted jurisdiction over tributaries only to the headwaters, which would exclude many intermittent streams. *See infra* pp. 19-24.

This Court has considered the geographic reach of the CWA only twice. Most recently, it ruled that the U.S. Army Corps of Engineers (Corps) exceeded its authority by asserting jurisdiction over nonnavigable, isolated waters under the Migratory Bird Rule. *SWANCC*, 531 U.S. 159 (2001). Of critical importance to the Court's conclusion was that section 404(a) speaks of "navigable waters." *Id.* at 162. The Court found section 404(a) to be clear: "The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172. This Court rejected the argument that "Congress' separate definitional use of the phrase 'waters of the United States' constitute[d] a basis for reading the term 'navigable waters' out of the statute."[5] *Id.* The Court acknowledged, however, that the phrase "waters of the United States" evinced a Congressional intent to reach "'at least some'" waters not traditionally navigable. *Id.* at 167 (quoting *Riverside*, 474 U.S. at 133).

Building on *Riverside* to give effect to the term "navigable," the *SWANCC* Court emphasized that there must be an "inseparable" relationship between nonnavigable and navigable waters to extend CWA jurisdiction to nonnavigable waters: "It was the *significant nexus* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *Id.* (emphasis added). The Court stressed that its holding in *Riverside* was "based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters." *Id.* (citing

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[5] Responding to the Government's argument in *SWANCC* that the CWA's legislative history showed that Congress intended the term "'navigable waters' to be given the broadest constitutional interpretation," this Court found that nothing "in the legislative history . . . signifies that Congress intended to exert anything more than its commerce power over navigation." *SWANCC*, 531 U.S. at 168 n.3.

Riverside, 474 U.S. at 135-39). It found no similar legislative history or rulemaking to support jurisdiction over the ponds in *SWANCC*.

In short, *Riverside* and *SWANCC* establish that when the Government seeks to extend CWA jurisdiction beyond navigable waters, the Government must show that the nonnavigable waters and the navigable waters are "inseparable." *SWANCC*, 531 U.S. at 167; *Riverside*, 474 U.S. at 134.

A. "Significant Nexus" Means an Important and Regularly Recurring Relationship.

"A" connection cannot establish a "significant nexus." "Significant" means "full of import," "important," "weighty," and "consequential."[6] *See Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 846 (9th Cir. 2003) (the "commonly understood" meaning of significant is "important"). Significant does not mean "a" or "any." Courts have explicitly rejected attempts to equate "significant" with "any." *See Onishea v. Hopper*, 171 F.3d 1289, 1299 (11th Cir. 1999) (holding that "significant risk" of HIV transmission does not mean "any risk" and "must be rooted in sound medical opinion and not be speculative or fanciful"); *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1189 (D.C. Cir. 1983) (television channels watched "occasionally" are not "significantly viewed" channels).

Environmental statutes and regulations take a similar view of "significant." When the Corps evaluates a permit application, it must prepare an environmental impact statement (EIS) if the permit will "significantly" affect the environment. 42

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[6] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2116 (1993) ("full of import," "IMPORTANT, WEIGHTY"); THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 2860 (1993) ("Important," "consequential"); RANDOM HOUSE UNABRIDGED DICTIONARY 1779 (1993) ("important; of consequence").

U.S.C. § 4332(2)(C). The Corps's regulations make clear that a "significant" permit is the exception, not the rule. 33 C.F.R. § 230.7(a) ("Most permits will normally require only an [environmental assessment]," not an EIS.). Similarly, the CWA § 404(b)(1) Guidelines bar permit issuance if a project would result in "significant degradation." Significance is to be assessed based on the "*persistence and permanence* of the effects," not fleeting or potential effects. 40 C.F.R. § 230.10(c) (emphasis added).

The required significant, inseparable relationship between a navigable water and a nonnavigable one must also be regular and continuous, rather than occasional or infrequent. This is confirmed by the Corps's regulations, which limit jurisdiction over non-wetland waters to the "ordinary high water mark" (OHWM). 33 C.F.R. § 328.4(c)(1). Cases interpreting that term have consistently found that OHWM, and thus the reach of CWA jurisdiction, is measured during "ordinary" conditions, not occasional or extraordinary conditions.[7] The Government's "any connection" theory, on the other hand, allows jurisdiction based upon "a" connection, no matter how infrequent, irregular, or attenuated the relationship between the water-bodies. That theory, in turn, facilitates the regulation of ephemeral and intermittent drainages, including ditches that may have an "occasional," but not "ordinary," relationship with navigable waters. But under *Riverside* and *SWANCC*, a water that has only an infrequent or occasional relationship to navigable waters cannot be considered to have a

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[7] *Oklahoma v. Texas*, 260 U.S. 606, 632 (1923) (the river bed *does not* include the "lateral valleys [even though they are] . . . temporarily overflowed in exceptional instances when the river is at flood."); *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 926 F.2d 1502 (9th Cir. 1991) (calculating ordinary high water line requires the exclusion of annual spring floods); *United States v. Harrell*, 926 F.2d 1036, 1042 (11th Cir. 1991) (the ordinary high water mark is "'the line to which high water ordinarily reaches'") (citations omitted).

significant nexus with navigable waters, even though it may have "a" connection under some extraordinary circumstances.[8]

B. The Fifth Circuit Properly Applied the Term "Navigable" and This Court's "Significant Nexus" Standard.

In contrast to the court below, the Fifth Circuit has faithfully applied the terms "navigable," "significant," and "inseparable." In *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), the court followed *Riverside* and *SWANCC* and rejected claims of jurisdiction over intermittent streams, *even though they had some connection to navigable waters:*

> There is no detailed or comprehensive description of any of these seasonal creeks available in the record. There is also very little evidence of the nature of Big Creek itself .... There is no detailed information about how often the creek runs, about how much water flows through it when it runs, or about whether the creek ever flows directly (above ground) into the Canadian River. In short, there is nothing in the record that could convince a reasonable trier of fact that either Big Creek or any of the unnamed other intermittent creeks on the ranch are sufficiently linked to an open body of navigable water ....

Id. at 270-71. Further, in *In re Needham*, 354 F.3d 340 (5th Cir. 2003), the court considered and rejected the argument that the CWA "covers all waters, excluding groundwater, that have any hydrological connection with 'navigable water.'" *Id.* at 345. The court declined to follow other courts that had accepted this theory because to do so "would push the [CWA] to the outer limits of the Commerce Clause and raise serious

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[8] Indeed, the most the Government can muster in *Carabell* is an "occasional" hydrological connection between the wetland and the adjacent ditch through "drainage cuts that run through the berm." Brief for the Respondents in Opposition [for a Petition of Certiorari], *Carabell v. U.S. Army Corps of Eng'rs*, No. 04-1384 at 5, 10 (filed June 2005) (U.S. Carabell Cert. Opp.).

constitutional questions." *Id.* at 345 n.8. Reaffirming *Rice*, the *Needham* court stated that "the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* 'a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water.'"[9]

Thus, the Fifth Circuit appropriately required that for a nonnavigable water to be deemed a water of the United States, it must have a regular, "close, direct and proximate link" or relationship to navigable waters. "Any" connection is not enough. *Rice*, 250 F.3d at 272.

II. THE GOVERNMENT TRIES TO AVOID *SWANCC* BY CLAIMING THAT ITS REASONING IS IRRELEVANT TO "CONNECTED" WATERS AND THEN FINDING "CONNECTIONS" IN UNLIKELY PLACES.

The Government's response to *SWANCC* is to avoid it.[10] It says that *SWANCC* dealt solely with "nonnavigable, isolated, intrastate waters." It then claims that this Court's construction of the statute and the reasoning that led to its decision in *SWANCC* are inapplicable to any situation in which a nonnavigable water, be it a ditch or ephemeral drainage, has any hydrological connection to a navigable water.[11] This theory,

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[9] *Needham*, 354 F.3d at 345-46; *see also FD&P Enters., Inc. v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 2d 509, 516 (D.N.J. 2003) (a hydrological connection, by itself, is not enough to confer jurisdiction).

[10] *See, e.g.*, U.S. Carabell Cert. Opp. at 3, 6 n.2, 8, 11; Brief of the United States as Appellee at 40-47, *United States v. Johnson*, No. 05-1444 (1st Cir. filed Aug. 24, 2005); Brief of the United States, Appellee at 26-32, *United States v. Krilich*, 303 F.3d 784 (7th Cir. 2002), *cert. denied* 538 U.S. 977 (2003) (No. 01-2746).

[11] This is wrong. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but

however, is based on specious reasoning which goes as follows:

- *SWANCC* held that an isolated water was not a water of the United States.
- Therefore, any water that is not isolated is a water of the United States.

The Government's reasoning sends courts and regulators on a fool's errand. No water is truly isolated.[12]

Moreover, that is not what this Court said. The *SWANCC* Court, informed by and explaining *Riverside*, found that nonnavigable waters must have a "significant nexus" to, and be "inseparably bound up with," navigable waters. 531 U.S. at 167-68 (citing *Riverside*, 474 U.S. at 134). But in the Government's hands, the "significant nexus" test is converted to a search for "any connection."[13]

Indeed, it is ironic that four years after this Court rejected the Corps's Migratory Bird Rule because, among other things, it would "result in a significant impingement of the States' traditional and primary power over land and water use," *id.* at 174, the Government has managed to use its "hydrological connection" theory to move even farther upgradient than it did under the bird rule. By now claiming all "connected" waters, such as ditches and ephemeral drainages, are "tributaries," the Corps has erected a skeleton of "connections"

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also those portions of the opinion necessary to that result by which we are bound.").

[12] As Justice Stevens pointed out in his dissent in *SWANCC*, for most waters, including the SWANCC ponds, it is possible to find a hydrological or ecological connection to navigable waters. *See* 531 U.S. at 176 n.2 (Stevens, J., dissenting); *see also infra* note 17.

[13] The Sixth Circuit followed the Government's chicanery: It said it was applying the significant nexus standard, but then allowed it to be "satisfied by the presence of a hydrological connection." *Carabell*, 391 F.3d at 710.

which then provide a basis to regulate any wetland "adjacent" to them.

In California's Central Valley, for example, prior to *SWANCC*, the Corps determined that two cattle waste ponds were waters of the United States because they were used by migratory birds. A nearby drainage ditch was deemed non-jurisdictional.[14] After *SWANCC*, the property owner sought a re-determination of jurisdiction over the ponds, only to be told that the ditch was now a tributary, and thus, the waste ponds remained jurisdictional, this time as "adjacent" wetlands.[15]

In the Corps's Jacksonville District Office, regulators have been instructed to "follow the drop of water."[16] Following the drop of water, however, is a limitless and tautological endeavor. All water is part of the hydrologic cycle, and, at some level, "connected."[17] Thus, in a case currently before the First Circuit, all that the Government needed to prove that a family cranberry farm "connects" to distant navigable waters was the deposition of its hydrologist that "[g]eographically speaking, the Sites are all located within the

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[14] Letter from Justin Cutler, Project Manager, Delta Office, U.S. Army Corps of Eng'rs, Sacramento Dist., to James Gibson, Gibson & Skordal (Aug. 24, 2000) at App. 5a-6a; Letter from James Gibson, Gibson & Skordal, to Justin Cutler, Project Manager, Delta Office, U.S. Army Corps of Eng'rs, Sacramento Dist. (Aug. 17, 2000) at App. 1a-4a.

[15] Letter from Michael Jewell, Chief, California/Nevada Section, U.S. Army Corps of Eng'rs, Sacramento Dist., to James Gibson, Gibson & Skordal (Aug. 13, 2001) at App. 7a-10a.

[16] *See* Presentation by John Hall, Chief, Regulatory Division, U.S. Army Corps of Eng'rs, Jacksonville Dist., *SWANCC Update and Aftermath* (Apr. 5, 2002) at App. 12a-13a.

[17] *See, e.g.*, U.S. Geological Survey, *The Water Cycle*, http://ga.water.usgs.gov/edu/watercycle.html; U.S. EPA Region 1, *The Water Cycle and Water Conservation* at A-2, http://www.epa.gov/region01/students/pdfs/ gndw_712.pdf ("In nature's water cycle, all things are connected.").

Weweantic watershed, and basic principles of hydrology indicate that water drains from the Sites until it reaches the Weweantic River and, eventually the Atlantic Ocean."[18] But, as EPA says, "[w]e all live in a watershed."[19]

A 2004 study by the General Accounting Office documents numerous instances in which Corps districts have used underground drain tiles, storm drain systems, and pipes to establish a hydrological connection to recapture jurisdiction over otherwise isolated features.[20] The Jacksonville District explicitly allows for connections "through mechanical means such as pumping."[21] Some districts limit the distance of such "connections," but the Chicago District recently issued guidance instructing its regulatory staff that "[t]here is no distance limitation."[22]

Ironically, in desert areas where there is seldom a drop of water to follow, and where the "marks" used to identify the

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[18] *See* Declaration of Scott Horsely ¶ 16 in support of United States's Memorandum in Support of its Motion for Summary Judgment on Liability, *United States v. Johnson*, No. 99-12465 (D. Mass. filed Feb. 19, 2004).

[19] U.S. EPA, *Watersheds*, http://www.epa.gov/owow/ watershed/; *see also* Physical Science: Concepts in Action at 704-08 (Pearson Prentice Hall 2004) (high school text book stating that "the Mississippi River watershed drains most of the central United States . . . from the Rocky Mountains in the west to the Appalachian Mountains in the east").

[20] General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* at 24-26 (Feb. 2004) (GAO Study), *available at* http://www.gpoaccess.gov/gaoreports.

[21] U.S. Army Corps of Eng'rs, Jacksonville Dist., *Approach on Identifying Adjacent Wetlands and Isolated Waters* (July 11, 2003) at App. 16a.

[22] Email from Mitchell Isoe, Chief, Regulatory Branch, U.S. Army Corps of Eng'rs, Chicago Dist., to U.S. Army Corps of Eng'rs, Chicago Dist., clarifying the Chicago District's Policy on CWA Jurisdictional Determinations (Feb. 9, 2005) at App. 18a.

"ordinary high water mark" on the barren desert landscape are often "remnants of a time when the water flowed along a different course,"[23] the Government applies its theory to the furthest extreme. Relying on such "marks" as evidence of "ordinary" water flow, the Corps regularly asserts jurisdiction over remote desert washes hundreds of miles from the nearest navigable water.[24] In Tucson, for example, the Corps determined that an ephemeral desert wash was a tributary to the Colorado River even though the wash terminated at a storm water detention basin hundreds of miles from the Colorado. The Corps determined that a "tributary connection" was established from the detention basin through a 6 inch diameter culvert. The culvert connected to a 1 foot wide channel, which connected to a concrete channel, which connected to a natural channel, which meandered through a residential neighborhood. Beyond that there was no channel, only paved surfaces. According to the Corps, however, "[t]hese road crossings act as conduits of the water and maintain the tributary connection" to three normally dry channels that finally connect to the Colorado River.[25]

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[23] GAO Study at 21.

[24] *See* U.S. Army Corps of Eng'rs, Los Angeles Dist., *Jurisdictional Determinations in Arizona*, *available at* http://www.spl.usace.army.mil/regulatory/jdocs/readx_jd_az.pl?order_by=filename&order=abc.

[25] U.S. Army Corps of Eng'rs, Los Angeles Dist., Admin. Appeal Decision, *Approved Jurisdictional Determination for the Sunrise Office Park, File No. 2001-00379-RJD*, at 2-4 (Sept. 7, 2001), *available at* http://www.spd.usace.army.mil/cwpm/public/ops/regulatory/adminAppeals/AS%20SENT%20FinalSunriseOfficeParkAppealDecision.pdf; *see also* U.S. Army Corps of Eng'rs, Los Angeles Dist., Admin. Appeal Decision, *Approved Jurisdictional Determination for the Turner Property, File No. 2000-00554-RJD*, at 2-6 (Apr. 2, 2001), *available at* http://www.spd.usace.army.mil/cwpm/public/ops/regulatory/adminAppeals/Turner.pdf (upholding a similar determination that ephemeral desert washes are tributaries and relying on a January 19, 2001, legal memorandum issued by the Corps and EPA which stated that "[*SWANCC*] did not overrule the hold-

The tracing of sheet flow or rainfall over land or pavement to sustain a connection is not unique to the desert.[26] In Lancaster, New York, the Corps deemed an otherwise isolated wetland a "tributary" to another nearby wetland despite acknowledging that the only hydrological connection between the two was infrequent, low velocity sheet flow that exhibited no discernible channeling. The Corps then included another wetland because it was "clearly a part of the same ecosystem," and thus, "adjacent" to the first wetland, despite having no "discernible outlet for water flow and no evidence that water ever flows from [it]." The Corps found all of these wetlands to be "connected" through 6,500 feet of municipal storm sewer to a creek, and ultimately to Lake Erie.[27]

III. THE GOVERNMENT'S THEORY IMPINGES ON THE STATES' TRADITIONAL AUTHORITY OVER LAND AND WATER USE WITHOUT A CLEAR CONGRESSIONAL STATEMENT.

As shown in the preceding sections, the Government's hydrological connection theory sweeps into federal control features that are "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *SWANCC*, 531 U.S. at 173. To interpret the statute as conferring such broad authority raises serious constitutional questions. Where an agency interprets a statute in

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ing or rationale of [*Riverside*], which upheld the regulation of traditionally navigable waters, interstate waters, their tributaries, and wetlands adjacent to each.").

[26] GAO Study at 18 (reporting that the San Francisco, Sacramento, and Los Angeles Districts base jurisdiction on "connect[tions] . . . through directional sheet flow during storm events").

[27] U.S. Army Corps of [illegible]g'rs, Buffalo Dist., Admin. Appeal Decision, *NEC Transit/William, L[illegible] File No. 2000-00325(2)* at 2-4 (Aug. 30, 2001) *available at* http://www.lrd.usace.army.mil/_kd/Items/actions.cfm?action=Show&item_id=1729&destination=ShowItem.

a manner that "invokes the outer limits of Congress's power" or "overrides . . . [the] usual constitutional balance of federal and state powers," this Court "expect[s] a clear indication that Congress intended that result." *Id.* at 172-74; *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). The clear statement rule[28] provides a judicial check on Congress's occasional inclination to legislate ambiguously so as to avoid the political consequences of tough policy choices. *See United States v. Lopez*, 514 U.S. 549, 574-79 (1995) (Kennedy, J., concurring).

The *SWANCC* Court made plain that there is no clear statement from Congress that it intended section 404(a) to reach features without a significant, inseparable nexus to navigable waters. 531 U.S. at 174. The Government does not even attempt to point to a statement of congressional authorization for its actions here. Therefore, this Court should, as it did in *SWANCC*, "read the statute . . . to avoid the significant constitutional and federalism questions raised" by the hydrological connection theory. *Id.*

The clear statement requirement is "heightened" where an agency interprets a statute in a manner that would "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173. Transforming drainage ditches, ephemeral waters, and other remote waters into "navigable waters" undoubtedly intrudes on the local regulation of land and water use, and thus, triggers the clear statement requirement.[29]

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[28] The "most important" rule of statutory construction "is the clear statement rule." 1 Lawrence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 5-9 at 853 (3d ed. 2000).

[29] The regulation of land and water use within a State's borders is a traditional State function. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994).

Nothing can be more local than the control of drainage, and, correspondingly, local land use.[30] *United States v. Deaton* provides a telling example. 332 F.3d 698 (4th Cir. 2003), *cert. denied* 541 U.S. 972 (2004). There, the Fourth Circuit deferred to the Corps's determination that a drainage ditch in Parsonsburg, Maryland, was a federally regulable "tributary" because it "eventually flowed" through 8 miles of ditches, culverts, ponds, and dams to navigable waters. The ditch in question was, in fact, a 6-8 inch deep roadside swale, approximately two feet wide. It was maintained by the Wicomico County roads department to collect rainfall runoff from the road. It fed into other drainage ditches constructed and maintained by the Beaverdam Public Drainage Association (PDA). A PDA is an organization of local landowners certified by the county under Maryland law to establish and maintain drainage systems for agricultural production and the "public benefit."[31] There are more than 100 active PDAs on the Eastern Shore of Maryland managing the drainage of more than 180,000 acres of land. The Fourth Circuit's holding that the roadside ditch and the PDA ditches with which it connects are waters of the United States federalizes these local ditches. This imposition of plenary federal power certainly intrudes on local governments' ability to manage local drainage.

Not only are drainage ditches local, they are everywhere. The U.S. Department of Transportation requires that any federally funded primary road be "designed . . . and maintained to have adequate drainage, . . . cross drains, and ditch relief drains." 30 C.F.R. § 816.151(d)(1). State and local govern-

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[30] *See generally New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans*, 197 U.S. 453, 460 (1905) (control of drainage is one of the most important police powers exercised by State and local authorities).

[31] MD. CODE ANN. Art. 25 §§ 52(a), 53 (2001). The Maryland legislature has declared that "such drainage shall be considered a public benefit and conducive to the public health, convenience, and welfare." *Id.* § 52(a).

ments impose similar requirements on the roads they fund. There are more than 3.9 million miles of roads in this country, which adds up to a lot of ditches and, under the Government's theory, a lot of navigable waters.[32] Nothing in the CWA indicates that Congress intended to reach so far.

Under our federal system, Congress may not effect such a result unless it clearly expresses its intent to alter the traditional balance between the federal and State governments. Here, Congress's intent is expressly to the contrary. Congress preserved the "federal-state balance" by "cho[osing] to 'recognize, preserve and protect the primary responsibilities and rights of States to . . . plan the development and use . . . of land and water resources'" within their borders. *SWANCC*, 531 U.S. at 166-67 (quoting 33 U.S.C. § 1251(b)). Just as there is "nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit," there is no clear statement that section 404(a) reaches nonnavigable ditches, erosional features, or intermittent streams that could "potentially" impact or "eventually flow" into navigable waters. *Id.* at 174.

The Government makes various arguments why its interpretation would not intrude upon the States' authority, all of which are unavailing. It says that "the only activity requiring a CWA permit is the discharge of a pollutant . . . . Other functions and activities relating to land use remain in the hands of local authorities." U.S. Carabell Cert. Opp. at 18; Brief for the United States in Opposition [for a Petition of Certiorari], *Rapanos v. United States*, No. 04-1034, at 24-25 (filed Apr. 2005) (U.S. Rapanos Cert. Opp.).[33] This ignores

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[32] *See* U.S. Dep't of Transp., Fed. Highway Admin., *Highway Statistics 2003 § V, Roadway Extent, Characteristics and Performance, Table HM-10, available at* http://www.fhwa.dot.gov/policy/ohim/hs03/ hm10.htm (last visited Nov. 28, 2005).

[33] The Government also argues that States can retain their power by seeking delegation of the CWA permitting program. Delegation does not

the fact that many activities inherent to land development constitute "discharges of pollutants," and downplays the consequences of being a "water of the United States." For such waters, among other things, water quality standards must be established and enforced, uses designated, and "total maximum daily loads" assigned. *See* 33 U.S.C. §§ 1313(a)-(d); 40 C.F.R. § 131.3(i). And when work needs to be done, for example, to maintain the carrying capacity of a roadside ditch, a permit must be obtained. Obtaining a CWA permit is costly and time consuming,[34] and the permit evaluation process draws the Corps into subjects far beyond the discharge of fill material that triggers the permit requirement.

For example, in *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2005), the applicant sought a permit to impact 7.5 acres of ephemeral desert washes on a 608-acre development site near Phoenix, Arizona. Applicable regulations as interpreted by the Ninth Circuit, however, required the Corps to treat the entire 608-acre *private* project as a "federal action," thus triggering a host of other federal requirements. Similarly, the Corps's "public interest review" regulations draw it into a police-power-like assessment of "the needs and welfare of the people." 33 C.F.R. § 320.4(a)(1).

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preserve the States' authority to control land and water use. It merely allows States to administer a *federal* program. *Carabell* is a perfect illustration of how little autonomy a State has when implementing a federal program. There, Michigan granted a permit, and EPA overruled the State. Finally, the Government argues there is no intrusion on State power when the Government is acting permissibly. This, however, is exactly the issue now before the Court.

[34] *See* David L. Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 74-76 (Winter 2002) (finding that an average individual section 404 permit application costs $271,596 to prepare (not counting costs of mitigation, design changes, and carrying capital), and that it takes an average of 788 days to complete the permitting process).

If, based on considerations of "aesthetics," "land use," and no less than seventeen other factors, the Corps determines that a project would be "contrary to the public interest," it will deny the permit application.[35] The Corps's Jacksonville District recently relied on the public interest review to deny an application to fill 30 acres of agricultural ditches, which had the effect of halting a 4,573 acre development project. The Corps found that the project was "contrary to the overall public interest at this time" because it was "inconsistent" with plans for a project that the Corps itself was hoping to undertake, although the future Corps project had yet to be authorized by Congress.[36] This is a far, far cry from the water quality goals of the CWA.

IV. THE GOVERNMENT'S THEORY IS INCONSISTENT WITH PAST AND PRESENT REGULATORY TREATMENT OF DITCHES, INTERMITTENT STREAMS, AND EPHEMERAL DRAINAGES AND WARRANTS NO DEFERENCE.

The Government's boldest argument in support of its boundless "any connection" theory is that *Riverside* authorizes its treatment of ditches and intermittent streams as waters of the United States because *Riverside* upheld jurisdiction over "all wetlands adjacent to other bodies of water over which the Corps has jurisdiction." U.S. Rapanos Cert. Opp. at 16 (citing *Riverside*, 474 U.S. at 135). Without support, this argument converts the Court's general contextual statement into a specific holding. The fundamental issue in *Riverside* was

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[35] This, notwithstanding this Court's observation in *Lopez* that the Constitution "withhold[s] from Congress a plenary police power." 514 U.S. at 566.

[36] U.S. Army Corps of Eng'rs, Jacksonville Dist., *Harmony Ranch Application Denial*, *available at* http://www.saj.usace.army.mil/pao/hotTopics/hot_topics_harmony.htm (last visited Nov. 26, 2005).

whether the Corps could treat "adjacent wetlands" as waters of the United States. The Court did not address which "other bodies of water" are waters of the United States, and it certainly did not consider, let alone hold, that distant ditches and intermittent streams are "navigable waters."

Moreover, the linchpin of the Court's decision in *Riverside* is starkly absent here. There, the Court deferred to the Corps's years-long rulemaking establishing the importance of adjacent wetlands to the water quality of navigable waters, and extensively documented Congress's consideration of, and express acquiescence to, the regulation of adjacent wetlands as waters of the United States during the debates on the 1977 CWA Amendments. Here, there is no rulemaking or legislative history to support the jurisdiction that the Government now claims. Indeed, had Congress in 1977, or this Court in 1985, considered the question of whether wetlands adjacent to ditches or drains are waters of the United States, the decisions would have gone the other way. At both times, ditches were expressly excluded from jurisdiction, intermittent streams were not regarded as tributaries, and ephemeral drainages were not even a glint in the administrative eye.

The Corps's first regulations implementing the CWA purported to regulate to the broadest constitutional extent of "navigable waters." 39 Fed. Reg. 12,115 (Apr. 3, 1974). The Corps's definition of "navigable waters" invoked the common understanding of that term as developed over more than a century of jurisprudence.[37] In 1975, responding to an unfavorable district court decision, the Corps adopted interim regulations expanding its jurisdiction beyond the broadest constitutional extent of navigable waters to reach the maximum extent of the Commerce Clause. *Natural Res. Def. Council v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

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[37] In *SWANCC*, this Court stated that the Government "put forward no persuasive evidence that the [Corps's 1974 regulations] mistook Congress' intent." 531 U.S. at 168.

The 1975 regulations asserted jurisdiction over navigable waters and their non-navigable tributaries up to their headwaters—a cutoff point that *excluded* the upper reaches of waterways and other waters "hydrologically connected" to them. *See* 40 Fed. Reg. 31,320, 31,324-25 (July 25, 1975).[38] In 1977, the Corps adopted final regulations asserting jurisdiction over navigable waters, nonnavigable tributaries, and certain waters beyond the tributary system if their degradation could affect interstate commerce. 42 Fed. Reg. 37,122, 37,144 (July 19, 1977).

With respect to the linear features at issue in this case, the Corps's 1975 regulations stated that "[d]rainage and irrigation ditches have been excluded" from the definition of jurisdictional waters. 40 Fed. Reg. at 31,321. The Corps's 1977 regulations similarly disavowed jurisdiction over ditches, stating that

> nontidal drainage and irrigation ditches that feed into navigable waters will not be considered "waters of the United States" under this definition. To the extent that these activities cause water quality problems, they will be handled under other programs of the [CWA] including Section 208 and 402.[39]

A footnote to the 1977 regulations explained that the new definition "incorporates *all* other waters of the United States

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[38] The "headwaters" is the region upstream of the point on the river or stream at which the average annual flow is less than five cubic feet per second. 40 Fed. Reg. at 31,325.

[39] The Corps's statement that ditches would be handled under other CWA programs, such as section 402, is consistent with the language of the CWA characterizing ditches as point sources. "Point source" means "any discernible, confined and discrete conveyance, including but not limited to any . . . ditch . . . ." 33 U.S.C. § 1362(14). Because the CWA regulates the discharge of pollutants "*to* navigable waters *from* any point source," if a given a ditch is a point source, it cannot also be a "navigable water." *Id.* § 1362(12) (emphasis added).

that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce . . . ." 42 Fed. Reg. at 37,144 n.2 (emphasis added). That all-encompassing definition did not include ditches or ephemeral drainages. It did include "tributaries," but did not regard intermittent streams as tributaries, or even as part of the tributary system. Instead, intermittent streams were grouped with other waters that were "not part of the tributary system" and were only considered waters of the United States upon a showing that their "degradation or destruction could affect interstate commerce." 33 C.F.R. §§ 323(a)(3), (a)(5) (1978).

There is little evidence that Congress was even aware of the Corps's 1977 regulations, which came out only days before the passage of the 1977 CWA Amendments. Thus, the 1975 regulations were in effect the last time Congress considered CWA jurisdiction in 1977. Those regulations explicitly excluded ditches from jurisdiction, claimed jurisdiction over tributaries only to the headwaters, and made no claim or record whatsoever for jurisdiction over dry land features such as ephemeral drainages. Moreover, in 1977, the Corps continued to exclude ditches and only regulated intermittent streams if they could affect interstate commerce.

The Corps's treatment of those waters in 1975 and 1977 means that the Government cannot now argue that Congress, when it enacted the 1977 CWA amendments, "acquiesced" to the Corps's current treatment of "ditches" as tributaries,[40]

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[40] The Government may argue that the section 404(f) exemptions that mention ditches evidence an intent to treat ditches as waters of the United States. This argument was made and rejected in *SWANCC*. Congress's decision in section 404(f) to "exempt certain types of these discharges does not affect, much less address, the definition of 'navigable waters.'" *SWANCC*, 531 U.S. at 171 n.7; *see also, Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1405 (D.C. Cir. 1998) (declining to "draw any inference [from section 404(f)] other than that Congress emphatically did not want the law to impede these bucolic pursuits.")

nor can it argue that *Riverside* upheld the regulation of ditches and intermittent streams as tributaries.[41]

Furthermore, nothing in the Corps's current regulatory definition of waters of the United States, adopted in 1986, suggests that "hydrological connection" can be the basis for jurisdiction. The regulations include tributaries, but do not define the term. Nor do they mention "hydrological connection." 33 C.F.R. § 328.3(a)(5). They exclude ditches,[42] treat intermittent streams separately from tributaries (as waters regulable if they "could affect interstate . . . commerce."), *id.* § 328.3(a)(3),[43] and do not mention ephemeral streams at all.

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[41] The Government may also try to point to section 404(g)(1) for congressional support, but, as this Court found in both *SWANCC* and *Riverside*, section "404(g)(1) does not conclusively determine the construction to be placed on the use of the term 'waters' elsewhere in the Act (particularly in § 502(7), which contains the relevant definition of 'navigable waters')." *SWANCC*, 531 U.S. at 171 (citing *Riverside* at 138 n.11). Moreover, the language in section 404(g)(1) hardly provides a clear statement of congressional intent to regulate all waters with a connection to navigable waters. Indeed, at the time section 404(g)(1) was enacted in 1977, jurisdiction in tributaries ended at the headwaters.

[42] *See* 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (stating that "we generally do not consider [drainage and irrigation ditches excavated on dry land] to be Waters of the United States," but claiming the authority to identify certain ditches case-by-case as waters of the United States).

[43] The "could affect" commerce rationale has been questionable as a basis for CWA jurisdiction since *Lopez*, 514 U.S. at 559 (effects on interstate commerce must be "substantial"). *SWANCC*'s holding that the CWA is grounded in the channels power confirms that the rationale is no longer viable. 531 U.S. at 168 n.3. And, the Government has acknowledged as much. *See* 68 Fed. Reg. 1991, 1996 (Jan. 15, 2003) ("in light of *SWANCC*, it is uncertain whether there remains any basis for jurisdiction under the other rationales of § 328.3(a)(3)(i)-(iii) over [the] isolated, non-navigable, intrastate waters" that are mentioned in that section); U.S. Carabell Cert. Opp. at 16 (claiming authority over distant ditches and intermittent streams now stems from the channels power).

Finding no congressional support for its actions, the Government will most likely argue that it is entitled to deference in interpreting the statute and its regulations. Where a statute is "clear"—as is the CWA's grounding in navigability—contrary agency interpretations do not warrant deference. *See SWANCC*, 531 U.S. at 172 ("We find § 404(a) to be clear"). Where a statute is ambiguous, non-arbitrary agency positions that are carefully considered and adopted through the rulemaking process merit deference. Less formal agency positions receive deference to the extent they have the "power to persuade." *Christensen v. Harris County*, 529 U.S. 576, 586-87 (2000). *Ad hoc* litigating positions are not entitled to deference. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988). The Corps's post-*SWANCC* hydrological connection theory is not the product of rulemaking, and it lacks any evidence of careful regulatory consideration. Indeed, the agencies themselves recognized the need for a rulemaking after *SWANCC* and began the process of instituting a "review [of] the regulations to ensure that they are consistent with the *SWANCC* decision."[44] But then abandoned it. In sum, the Government's current position, manufactured in recent litigation, is inconsistent with its earlier pronouncements regarding ditches, intermittent streams, and other non-navigable features, and finds no support in the current regulations. Accordingly, the Government is not owed any deference by this Court. *Id.*; *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001).

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[44] *See* 68 Fed. Reg. at 1993.

V. THE GOVERNMENT HAS AMPLE AUTHORITY TO REGULATE POLLUTING ACTIVITIES THAT WILL IMPACT NAVIGABLE WATERS WITHOUT DECLARING EVERY DITCH AND EPHEMERAL DRAINAGE A "WATER OF THE UNITED STATES."

Finally, the draconian and intrusive effect of the broad scope of CWA jurisdiction advanced by the Government, and approved by the court below, need not be tolerated in order to achieve the goals of the Act. The Government argues that it must treat all waters with any hydrological connection to navigable waters as "waters of the United States" because there is a "risk" that pollutants discharged to upgradient ditches will migrate downstream and ultimately degrade a navigable water.[45] Citing a statement in the legislative history that "'[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source,'"[46] the Government claims that to "control the discharge of pollutants at the source," it must treat the "source"—in these cases, ditches and intermittent streams—as "waters of the United States."

This is wrong on the law and the facts. The Act provides ample means to regulate upgradient polluting *activities* that will impact navigable waters. Indeed, the 1972 CWA Amendments effected a sea change in the law precisely to provide

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[45] *See* U.S. Rapanos Cert. Opp. at 13. The CWA does not regulate risks to "navigable waters"; it regulates actual discharges. Without an actual discharge, there is no jurisdiction. *Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486, 505 (2d Cir. 2005).

[46] *See, e.g.*, Brief of the United States, Appellee at 22-23, *United States v. Gerke Excavating, Inc.*, 412 F.3d 804 (7th Cir. 2005) (No. 04-3941) (quoting S. REP. NO. 92-414 at 77 (1972) *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742); *see also* U.S. Rapanos Cert. Opp. at 10.

that authority.[47] The prior law had focused on establishing water quality standards for navigable waters. The 1972 Act shifted to preventing the discharge of pollutants in the first place. Thus, now the Act prohibits the "discharge of any pollutant," which is defined as "any addition of any pollutant to navigable waters from any point source" without a permit. 33 U.S.C. §§ 1311(a), 1362(12). The Act has two permitting programs to regulate the discharge of pollutants. *Id.* §§ 1342, 1344. Section 402 (the National Pollutant Discharge Elimination System (NPDES)) regulates the disposal of waste materials in soluble effluent, typically from industrial and municipal sources.[48] Section 404 regulates the placement of dredged and fill material, and is generally associated with construction activities. Section 402 effluent wastes are generally disposed through "point sources," such as pipes and/or ditches, and flow to a navigable water. Section 404 fill, by contrast, generally does not migrate anywhere, but instead "fills" the area into which it is placed, usually creating a stable foundation for construction activities.

These two regulatory programs, taken together, establish broad federal power to regulate pollutant discharging *activities* at their source. EPA has long claimed, and courts have allowed, broad authority to regulate the discharging activity, wherever it occurs, when the discharged pollutants migrate to navigable waters. Thus, the *activity* is regulated without calling the *location* at which the activity takes place, or any intermediate conveyance, a water of the United States.

An early EPA General Counsel Opinion explains EPA's view that "the basic triggering mechanism [for the Act's per-

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[47] *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 203 (1976) (discussing the drastic change in method of CWA regulation from water quality standards to point source control).

[48] *See id.* at 204; *Nat'l Wildlife Fed'n v. Gorsuch*, 530 F. Supp. 1291, 1304 (D.D.C. 1982) (NPDES program is the "heart" of the Act).

mitting requirements] . . . is the release of pollutants from some form of conveyance or container into navigable waters."[49] Once triggered, the permit requirements apply directly to the pollutant's source, but the source does not become a water of the United States.[50] EPA confirmed this interpretation by defining "discharge of pollutants" to include a release to a conveyance that eventually reaches navigable waters. EPA explained that

> a discharge to a pipe is not, *in and of itself*, a discharge of pollutants subject to the permit program. A discharge to a pipe must ultimately reach navigable waters in order to fall within the purview of the NPDES requirements.[51]

By the same token, EPA treats pollutant discharges to municipal separate storm sewer systems (MS4s) as discharges *through* MS4s to navigable waters. It does not regard the sewer system itself as a water of the United States. Thus, the government is able to regulate the polluting *activity* without

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[49] *In re Friendswood Dev. Co.*, 1976 WL 25237, at *2 (EPA Gen. Counsel Op. June 11, 1976).

[50] *Id.* at *4 ("Friendswood's customers create pollutants—they should therefore be directly responsible for their proper disposition."). Of course, an episodic link to navigable waters via the "discharge of a pollutant" does not mean a nonnavigable water has an inseparable and significant relationship with navigable waters, and thus, becomes a water of the United States. A nonnavigable water may become a water of the United States only if the waterbody itself has a significant and regular relationship with a navigable water. *See supra* pp. 4-8.

[51] 44 Fed. Reg. 32,854, 32,857 (June 7, 1979) (emphasis added). "This definition includes additions of pollutants into waters of the United States from . . . discharges through . . . other conveyances owned by . . . other person[s] which do not lead to a treatment works; and discharges through . . . other conveyances, leading into privately owned treatment works." 40 C.F.R. § 122.2.

transforming the *location* of that activity into a water of the United States.[52]

Case law supports EPA's long-held position that it has ample authority to regulate pollutants at their source without calling intervening conveyances waters of the United States. *See, e.g., United States v. Ortiz*, 2005 U.S. App. LEXIS 23559 (10th Cir. Nov. 1, 2005) (affirming a conviction for flushing chemical waste down a toilet that led to a sewer system that discharged into the Colorado River without calling the sewer system or the plumbing "waters of the United States"); *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994) (requiring an NPDES permit for discharges of liquid manure that traveled over a swale, through a pipe, and in a ditch, and ultimately to waters of the United States with-out calling the ground, pipe, or ditch "waters of the United States").

The Fifth Circuit's decision in *Needham* illustrates the point. There, oil was discharged from defendant's well into an upland drainage ditch and migrated through two nonnavigable bayous to a navigable water. The court held the defendant liable because the oil reached a nonnavigable bayou that was "adjacent to an open body of navigable water, namely the Company Canal." 354 F.3d at 346. Notably, the court explicitly rejected the Government's "any hydrological connection" argument, and refused to treat the ditch and the intervening bayous as waters of the United States. *Id.* at 345. But the Government was nonetheless able to reach the discharge of pollutants at the source.

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[52] 40 C.F.R. § 122.26(a)(4); 55 Fed. Reg. 47,990, 47,997 (Nov. 16, 1990). The Act and EPA similarly regulate discharges to publicly owned treatment works (POTWs) as pass-through discharges without calling POTWs waters of the United States. *See United States v. Hartsell*, 127 F.3d 343, 348 (4th Cir. 1997) (finding liability for discharge through sewer system without holding that sewer system is waters of the United States); 40 C.F.R. pt. 403.

The Act, case law, and EPA's previous positions belie the Government's present claim that it must treat ditches as waters of the United States because "pollutant discharges into wetlands and their adjacent tributaries will ultimately impair the quality of traditional navigable waters." U.S. Rapanos Cert. Opp. at 13. This claim rings particularly hollow in the context of a section 404 activity. Fill material does not migrate.[53] The Government has ample authority to regulate polluting activities without federalizing the locations where the activities occur, or any intermediate conveyances between the activity and the "navigable waters."

CONCLUSION

For all of the foregoing reasons, the decisions of the Court of Appeals in *Rapanos* and *Carabell* should be reversed.

Respectfully submitted,

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Counsel for Amici Curiae

December 2, 2005

[53] Robert J. Pierce, Wetland Science Applications, Inc., *Technical Principles Related to Establishing the Limits of Jurisdiction for Section 404 of the Clean Water Act*, 36, 40 (April 2003), Docket No. EPA-HQ-OW-2002-0050-1835, *available at* http://www.regulations.gov/fdms public-rel11/component/main.

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APPENDIX

GIBSON & SKORDAL
Wetland Consultants
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Sacramento, California 95825
(916) 569-1830
Fax: (916) 569-1835

August 17, 2000

Mr. Justin Cutler
Army Corps of Engineers
Regulatory Branch
1325 J Street
Sacramento, California 95814

Subject: Revised Wetland Delineation Report - Franklin Meadows, Sacramento County, California

Dear Mr. Cutler:

This letter presents the results of a jurisdictional delineation and subsequent revisions for the approximately 261-acre study area located immediately east of Franklin Boulevard and ½ mile south of Elk Grove Boulevard in Section 4, Township 6 North, and Range 5 East of Sacramento County, California (Latitude 38° 23' West, Longitude 121° 26' North). The attached Figure 1 is a vicinity map.

Field studies were conducted on October 27, 1999 and August 15, 2000 for the purpose of identifying all potential jurisdictional waters including wetlands within the study area. Wetlands were mapped in the field onto a 1"=200' topographical map. Area of jurisdictional wetlands was determined by field measurements.

The **"Corps of Engineers Wetlands Delineation Manual"**[1] was used as the standard for determining whether specific areas are wetlands subject to regulation under Section 404 of the Clean Water Act. Corps of Engineers' regulations (33 CFR 328) were used to determine the presence of waters of the United States other than wetlands. The **"National List of Plant Species That Occur In Wetlands: California (Region 0)"**[2] was used to determine the wetland indicator status of observed plant species. The **"Soil Survey of Sacramento County, California"**[3] was used to evaluate soil mapping for the study area.

The study area consists of leveled, irrigated pasture land which has been used for dairy farming and crop production in the past. A few abandoned barns, out-structures, and excavated dairy waste sumps still remain from the old dairy operation. Numerous irrigation ditches bisect the study area. Mapped soils types include San Joaquin silt loam, leveled, 0 to 1 percent slopes; and San Joaquin-Galt complex, leveled, 0 to 1 percent slopes. A majority of the study area is mapped as San Joaquin-Galt complex which are generally described as moderately well drained soils that have been cut and leveled and/or filled. The mapped soils are not considered to be hydric but they do have hydric inclusions in basins and depressions.

Habitat in the study area consists almost entirely of open annual grassland characterized by soft chess (*Bromus mollis*), tarweed

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[1] Environmental Laboratory. 1987. Corps of Engineers Wetlands Delineation Manual. Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station. Vicksburg, Miss.

[2] Reed, P.B. 1988. National List of Plant Species That Occur in Wetlands: California (Region 0). Biological report 88(26.10). May 1988. National Ecology Research Center, National Wetlands Inventory, U.S. Fish & Wildlife Service, St. Petersburg, Florida.

[3] USDA, Soil Conservation Service. 1991. Soil Survey of Sacramento County, California.

(*Holocarpha virgata*), yellow star-thistle (*Centaurea sostitialis*), and Mediterranean rye (Hordeum hystrix). Other common species include perennial rye (*Lolium perenne*), prickly lettuce (*Lactuca serriola*), English plantain (*Plantago lanceolata*), curly dock (*Rumex crispus*), and chicory (*Cichorium intybus*). Attached is a partial list of plant species observed in the study area including their wetland indicator status.

Jurisdictional waters identified in the study area include approximately 0.09 acre of seasonal wetlands including SW1 (900 sq. ft.), SW2 (840 sq. ft), SW3 (850 sq. ft.) and SW4 (1,250 sq. ft.). Also, as identified by the Corps of Engineers during field verification, two abandoned dairy waste sumps totaling 0.98 acre have been determined to be jurisdictional waters. The attached delineation map shows the location and size of jurisdictional wetlands. Also attached are data sheets for representative data points taken during the field investigation.

All of the seasonal wetlands occur within shallow depressions located at or adjacent to the toe of road berms which flank irrigation ditches. Typically these areas pond surface water for long duration during the winter and early spring, but they tend to dry up by late spring in most years. Wetland hydrology indicators observed in the field include location within a defined depression overlaying tight clay soils, algae matting, oxidized root channels on live roots, and deep hoof marks left by cattle.

Typical soils in the seasonal wetlands are very dark grayish brown (10YR 3/2) clay loams with mottles at depths of 1 to 6 inches. Some of the wetland areas lacked obvious hydric soil color indicators by they showed clear evidence of aquic moisture regimes. In these areas, hydric soils were assumed present based on the presence of an aquic moisture regime. Vegetation in the seasonal wetlands is dominated by annual rabbit-foot grass (*Polypogon monspeliensis*) and Mediterranean barley (*Hordeum hystrix*). Common associates in-

clude mannagrass (*Glyceria sp.*), slender popcorn flower (*Plagiobothyrs stipitatus*), perennial rye, curly dock, clustered dock (*Rumex conglomeratus*), and postrate knotweed (*Polygonum aviculare*).

The two abandoned dairy sumps (0.98 acre) contain open water and wetland vegetation. Approximately 90 percent of S1 was ponded in mid-August with a wetland fringe dominated by swamp timothy (*Crypsis schoenoides*), barnyard grass (*Echinochloa crusgalli*), and knotgrass (*Paspalum distichum).* Approximately 30 percent of S2 was ponded in mid-August. Wetland vegetation is dominated by swamp timothy and smartweed (*Polygonum sp.*). The adjacent upland is dominated by soft chess and yellow star thistle.

A number of irrigation ditches associated with past farming and dairy operations occur within the study area. The ditches were initially constructed in uplands for purpose of irrigation, and as such, they are not jurisdictional waters subject to regulation by the Corps.

In summary, we identified a total of 1.07 acres of jurisdictional waters including four seasonal wetlands and two abandoned dairy sumps as shown on the attached delineation map. If you have any questions concerning this report or need additional information, please contact me at (916) 569-1830.

Sincerely,

James C. Gibson
Principal

JCG:bjs
w/Attachments

cc: Mr. Craig Naglar
Dunmore Homes
2150 Professional Drive, Suite 150
Roseville, California 95661

DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, SACRAMENTO
CORPS OF ENGINEERS
1325 J STREET
SACRAMENTO, CALIFORNIA 95814-2922

August 24, 2000

Regulatory Branch (199900653)

James Gibson
Gibson & Skordal
2277 Fair Oaks Blvd., Suite 395
Sacramento, California 95825-5500

Dear Mr. Gibson:

This letter concerns the delineation of waters of the United States, including wetlands, you have provided on behalf of Dunmore Homes for the Franklin Meadows project. This property is located in Section 4, Township 6 North, Range 5 East, Sacramento County, California.

I have reviewed and verified your **August 17, 2000, Revised Wetland Delineation Report—Franklin Meadows, Sacramento County, California** document and drawing showing approximately 1.07 acres of waters of the United States, including wetlands, within the surveyed area. Our jurisdiction in this area is under Section 404 of the Clean Water Act based on the definition of waters of the United States, as defined in 33 CFR 328. A Department of the Army permit is required prior to discharging dredged or fill materials into waters of the United States. Accordingly, a permit will be required prior to filling any of the waters present on the property. The type of permit required will depend on the type and amount of waters which would be lost or adversely modified by fill activities.

This verification is valid for five years from the date of this letter unless new information warrants revision of the deter-

mination before the expiration date. Please refer to identification 199900653 in any correspondence concerning this project. If you have any questions, write to Mr. Justin Cutler, Room 1480 at the letterhead address, or telephone (916) 557-5258.

Sincerely,

Justin Cutler
Project Manager, Delta Office

Enclosure

Copies Furnished (w/o enclosures)

Craig Nagler, Dunmore Homes, 2150 Professional Drive, Suite 150, Roseville, California 95661-3760

DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, SACRAMENTO
CORPS OF ENGINEERS
1325 J STREET
SACRAMENTO, CALIFORNIA 95814-2922

August 13, 2001

Regulatory Branch (199900653)

James Gibson
Gibson & Skordal
2277 Fair Oaks Blvd., Suite 395
Sacramento, California 95825-5500

Dear Mr. Gibson:

This letter concerns your request, submitted on behalf of Dunmore Homes, to review the verified August 17, 2000, wetland delineation for the Franklin Meadows property. This property is located in Section 4, Township 6 North, Range 5 East, in Sacramento County, California.

As a result of your request and because of recent court decisions, we conducted a through review of the jurisdictional issues for the subject property. As you are aware, ditches excavated in uplands are usually not considered waters of the United States. However, drainage ditches which were constructed in re-routed or channelized naturally occurring tributary streams generally are waters of the United States, even if they were excavated in upland areas or prior converted cropland. Among other documentation, including information you provided, we reviewed historical aerial photographs and topographical maps of the property. This information indicates progressive re-routing and channelization of tributary waters on the property. As such, we have determined that a portion of the existing drainage ditch is considered a waters of the United States, and tributary to Stone Lake (See enclosed map).

Furthermore, we have reviewed your assertion that the two ponds, identified as S1 and S2 in **your August 17, 2000, Request for Verification of Revised Delineation - Franklin Meadows Project, Sacramento County, California**, are isolated and not subject to jurisdiction. Based on the information, we cannot concur with this assertion. The subject ponds are abandoned, meet all three wetland criteria, and are adjacent to waters of the United States. Therefore, the ponds are considered waters of the United States.

In light of the above determinations, our August 24, 2000, wetland verification letter for this property is no longer valid. A revised wetland delineation map, which includes a portion of the drainage ditch and wetlands subject to our jurisdiction should be submitted to this office for final verification.

We appreciate your cooperation in this matter. Please refer to identification number 199900653 in any correspondence concerning this project. If you have any questions, please write Mr. Justin Cutler, Room 1480 at the letterhead address, e-mail: jcutler@spk.usace.army.mil, or telephone (916) 557-5258.

Sincerely,

Michael S. Jewell
Chief, California/Nevada Section

Enclosure

Copies Furnished w/Enclosure:

Craig Nagler, Dunmore Homes, 2150 Professional Drive, Suite 150, Roseville, California 95661-3760

Kent McDermitt, The McDermitt Co., 735 Sunrise Ave., Suite 155, Roseville, California 95661-4532

CESPK-CO-R 13 Aug 2001

MEMORANDUM FOR RECORD

SUBJECT: Jurisdictional Determination for Franklin Meadows Property (Regulatory Branch Number 199900653)

1. A request to review the subject property's verified August 17, 2000, *Revised Wetland Delineation Report - Franklin Meadows, Sacramento County, California*, was received by the applicant's agent on March 22, 2001. The applicant's agent specifically requested that we review the jurisdictional status of two seasonal wetlands identified as SW1 and SW2 in the above mentioned delineation document. On July 12, 2001, the agent requested we withhold making any decisions until we had been provided additional information. The following information is a summary of the findings and conclusions.

2. Historical photographs, topographical maps, and other documentation for the area were reviewed. In particular the following referenced data were used to support our determination:

a. February 18, 2000, aerial
b. May 22, 1989, aerial
c. March 24, 1973, aerial
d. August 17, 1937, aerial
e. 1909 U.S. Geological Survey Topographic map.

3. Pursuant to the *January 17, 1991, Questions and Answers Regarding RGL 90-7*, ". . . drainage ditches which were constructed in re-routed or channelized naturally occurring tributary streams generally are waters of the U.S. even if they were excavated in upland areas or prior converted cropland." Interpretation of reference (d) and (e) indicate the presence of a tributary to Stone Lake in the early 1900's, which crossed the property. The references listed indicate the progressive re-routing and channelization of previously existing natural

tributaries. Reference (a) shows sufficient drainage of water from the property through the existing culvert under Franklin Blvd. and into the natural tributary east of Franklin Blvd., which is a tributary to Stone Lake. Based on this information, we have determined that a portion of the ditch is considered a tributary waters of the United States. The beginning point of this tributary has been drawn by extrapolating reference (e)'s 20 foot contour line to a point on the existing drainage. We believe this is a reasonable point at which naturally occurring tributary waters existed (See attached map).

4. As such, the two seasonal wetlands in question are considered wetlands, which meet all three wetland criteria, and area adjacent to waters of the United States. Furthermore, a hydrologic analysis provided in the agent's June 26, 2001, letter specifically describes these seasonal wetlands as overflowing during a 10-year annual rainfall scenario.

US ARMY CORPS
OF ENGINEERS
Jacksonville District

SWANCC Update and Aftermath

John R. Hall
Chief, Regulatory Division

12a

Jurisdictional Determinations

- Corps is spending more time looking for
  - > Tributary connections
  - > Adjacency of wetlands
  - > Evidence of navigable use or potential navigable use of the open water areas

- Done by all offices spread across entire State.
  - > HQ promises guidance is coming
  - > Difficult ones reviewed by Jacksonville Office.

- Practicable application: follow the drop of water.
- Key Terms.
  - > Contiguous: Those wetlands which are physically connected to navigable waters
  - > Adjacent: Those wetlands which are near tributaries to navigable waters but are not physically connected.
  - > Isolated: Those wetlands whereby the waters could not reach navigable waters via surface flow or are not in close physical proximity to other waters of the United States.

DEPARTMENT OF THE ARMY
Jacksonville District Corps of Engineers
P.O. Box 4970
Jacksonville, Florida 32232-0019

Jacksonville District
Approach on Identifying Adjacent Wetlands and Isolated Waters

July 11, 2003

This paper consolidates and restates the longstanding approach of the Jacksonville District on identifying adjacent wetlands and isolated waters under the Corps Clean Water Act Regulatory Program. Although the District has generally provided this guidance informally to staff in the past, because of the current size of the District and the scrutiny on the Corps determinations of waters of the US after the SWANCC Supreme Court Decision, it is necessary to provide a written statement of the District's longstanding approach. This paper does not establish new policy guidance on waters of the US.

The Supreme Court's decision in the SWANCC cases raised several issues that will be interpreted by Corps of Engineers rulemaking with EPA. In the interim, Districts have been directed to use the approach that they did prior to the "migratory bird rule" to make determinations of tributary systems, adjacent wetlands and isolated waters.

Adjacent Wetlands: Under the Corps Regulation, the term adjacent wetlands means *"bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are "adjacent" wetlands.* (33CFR328.3 (c)). This District has viewed adjacent wetlands to have two components, a physical component and a hydrologic connection component. The Corps definition talks in terms of "narrow" non-water of the US features, such as river berms, man made barriers and the like.

As a rule of thumb, if a wetland is within 200 feet of open waters (defined in this context and used in this document as any flowing or standing surface water, even though the water may not be present for the entire year) of another water of the US (wetlands can not be adjacent to other wetlands, such as wetlands that are contigous to open waters that are a tributary) then the wetland area is considered adjacent to that open water of another water of the US.

As provided in Corps regulations, wetlands cannot be adjacent to the other wetlands, they must be adjacent to open waters of another water of the US. Open waters clearly include areas below the OHWM of any open water area such as a lake, pond or stream. Most "sloughs" and other headwater systems in Florida have "open waters" including very small channels that have evidence of an OHWM. The water does not have to be present or flowing year round, just the extent that an OHWM is established.

Tributary: The concept of tributary is critical to determining whether an area is a water of the US. If there is any tributary with open waters, no matter how small, then wetlands may be "adjacent" to those open waters of the tributary. Any surface water connection that has a defined OHWM or is part of a continuum of wetlands, whether natural or man-made, is a tributary connection. This approach was used prior to the migratory bird rule" and subsequent to it was clarified and included in the preambles to the Nationwide permits reauthorizations (See Corps 2000 preamble to its Nationwide permits at Federal Register Vol. 65, No. 47, March 9, 2000, pages 12823 to 121824 and Corps 1991 preamble to its Nationwide permits at Federal Register Vol. 56, No. 226, November 2, 1991, pages 59112 to 59113). Under the District's traditional approach as clarified in the guidance in the Corps Nationwide permits preamble, a large portion of the canals, and drainage ditches in Florida are tributaries, because they re-route former natural flows that previously occurred

through a slough system, or sheetflow across the landscape, that canal or ditch has replaced the former water flow and becomes a tributary water of the US. The canal or ditch carries water and pollutants from upstream to downstream areas. Moreover, where a canal or ditch has connected a formerly isolated wetland and other waters of the US, and the canal or ditch, has an OHWM or is part of a continuum of wetlands, then that canal or ditch, as well as the upstream wetland, becomes a tributary water of the US. Culverts under roads and other upland features, weirs, drop structures and other structures do not eliminate the tributary connection, provided there is some conveyance of the water from upstream to downstream, (even through mechanical means such as pumping for example). Similarly, some tributaries convey water from upstream to downstream in natural underground flow-ways such as in karst formations. Where a substantial amount of the water is determined by the Corps to flow regularly under normal conditions through such underground areas, the tributary connection is maintained, since pollutants flow directly from upstream to downstream areas.

Tributaries routed through treatment systems: In some situations in the Jacksonville District, tributaries have been routed through waste treatment systems (including storm-water management ponds). Our position is that although the waste treatment system itself is not jurisdictional, the conveyance from upstream to downstream is maintained and the jurisdictional connection to all of the upstream wetlands remains intact. Any party wanting to eliminate the tributary conveyance by filling the treatment pond for example, would also sever jurisdiction to all waters upstream of the filling. Those waters upstream of the filling would now be isolated. Therefore, the entity performing the filling would be required to either re-route the conveyance through some means such as a ditch, culvert, pipe, etc., or mitigate for all upstream losses of jurisdictional waters.

Isolated Waters: Wetlands or other waters that are surrounded by uplands and are not either adjacent or tributary as described above are isolated waters. This includes wetlands that directly communicate with ground water but do not have a "substantial" downstream flow to other waters of the US. Isolated waters that have no connection to interstate commerce other than use of the water or wetland by migratory birds are not waters of the US. The District has in the past used navigable use of an isolated water as a connection to interstate commerce, and that interstate commerce connection is still valid. For example, if a pond, lake, or stream is physically isolated (no tributary connection to downstream waters) but has a public boat access, even for small watercraft, such as canoes or kayaks, that water remains a water of the US, because of the potential use by interstate travelers. Public boat ramps and other public boat access are very strong evidence of navigability on otherwise isolated lakes and ponds. However, there may be instances where a dedicated public access point is non-existent, but one or many "in fact" public access points are able to be utilized. All around this District, many people launch canoes and small boats at bridge crossings in state and local DOT RsOW. The basic assumption here is that one must have some way to reasonably access the water body without unlawfully trespassing on privately held property. Trespass on publicly owned property may still be an unresolved issue but given the decades old practice of allowing it in this District, it appears to be a legitimate way of accessing some waters.

-----Original Message-----
From: Isoe, Mitchell A LRC
[mailto:Mitchell.A.Isoe@lrc02.usace.army.mil
Sent: Thursday, February 10, 2005 8:57 AM
Subject: Chicago District Regulatory Program Bulletin U.S. Army Corps of Engineers Chicago District Regulatory Branch

February 9, 2005

This communication is intended to provide you with current information on our Regulatory Program.

Jurisdictional Determinations

1. Underground Connections: Consistent with federal case law, the District wishes to clarify that underground connections can serve as sufficient hydrologic connections for a body of water to be considered a tributary to a "waters of the United States," and thus subject to the Clean Water Act jurisdiction of the U.S. Army Corps of Engineers.

The following is provided for clarification:

The District may assert jurisdiction over piped conveyances even if there is no evidence of a historical connection. The presence or absence of a "historical" or "natural" connection. is not determinative of whether or not a body of water is jurisdictional. The piped hydrologic connection must be present and verified. A dye test, tile survey, engineering plans, or other appropriate means could be used to confirm the presence of the connection. The connection must be discrete and easily traceable. There is no distance limitation.

2. Final Jurisdictional Determinations: Once the District completes a final jurisdictional determination, the District will not make a re-determination unless the District based its determination on incorrect information. On a case-by-case basis, the District may make re-determinations, only upon a

finding that the original determination was made based on incorrect information or material omissions.

3. Requests for Jurisdictional Determinations: Only a landowner can request a final jurisdictional determination. Non-owners can request a jurisdictional determination but it will be rendered as preliminary, and subject to change. Only the landowner can authorize Regulatory Branch staff legal access to a property that is typically required for a final determination.

Mitchell A. Isoe
Chief, Regulatory Branch